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Religion in Custody Proceedings

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RELIGION IN CUSTODY PROCEEDINGS

I. INTRODUCTION

The historical tradition of complete parental control over the religious education of their children, plus the doctrine of separation of church and state usually prevented religion from being a factor in custody proceedings before the turn of the century.[1] Since then the question of religion has become a steadily increasing problem not only in custody, but also in adoption and guardianship cases. The determination of a child's future custodian may arise where one or both parents die; where the parents are no longer fit, or able to care for the child; or more frequently where the parents are separated or divorced. The fact that there is an increase of custody cases in which religion is an issue represents a change in the attitudes of the entire society toward the institution of marriage. Statistics show that not only is there a trend toward more mixed marriage,[2] but that such marriages have a much higher divorce rate than where the parties are of the same faith.[3] There is no reason to doubt that this trend will continue to grow, and thereby increase the number of disputes involving religious training of the children from these broken homes.

The tendency has been for legal writers to categorize the court decisions concerning religion and custody into two or three general theories.[4] While the majority of the cases can be accommodated within these theories, it appears the subject can best be pursued in the light of the important elements considered by the courts in making their award. Therefore, after a discussion of the general theories, these elements will be analyzed to determine what effect they have in a custody proceeding where religion is an issue.

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1. See Friedman, **The Parental Right to Control the Religious Education of A Child,** 29 HARV. L. REV. 485, 497-500 (1916).

2. See Bossard and Letts, **Mixed Marriages Involving Lutherans—A Research Report,** 18 MARRIAGE AND FAMILY LIVING 308 (1956); Thomas, **Factor of Religion in the Selection of Marriage Mates,** 16 AMERICAN SOCIOLOGICAL REVIEW 487 (1951).

3. See Landis, **Marriages of Mixed and Non-Mixed Religious Faiths,** 14 AMERICAN SOCIOLOGICAL REVIEW 401, 403 (1949).

4. See Note, **Religion as a Factor in Adoption, Guardianship and Custody,** 54 COLUM. L. REV. 376 (1954); Comment, **Parents Right to Prescribe Religious Education of Children,** 3 De Paul L. Rev. 83 (1953); Note, **Religion—A Factor in Awarding Custody of Infant?** 31 So. Cal. L. Rev. 313 (1958). See also Boerger v. Boerger, 26 N.J. Super. 90, 97 A.2d 419, 422 (1953).

II. THREE GENERAL THEORIES

A. *The Parental Right Theory*—The "parental right" is founded upon the absolute right of parents to determine the religion of their children, disregarding all other considerations.[5] The theory not only applies in custody proceedings between the natural parents or parent and a third party,[6] but also in a contest between two natural parents professing different religions.[7] In those cases the court refers to the right or privilege of a child to be raised in the religion of his birth[8] or baptism.[9] Where it is not desirable to grant custody to a party of the same faith as the child, the court will then condition an award of custody upon raising the child in a specified religion, which will usually be different from that of the custodian.[10]

The "parental right" theory developed from the nineteenth century English law, which afforded a father the right to choose his child's religion.[11] It was so firmly established in England that the rule even prevailed after the father's death.[12] Today, England by statute,[13] and the United States by statute and case law have abolished the superior right of the father, making both parents equal as regards the care, nurture, and welfare of the children of

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5. Matter of Turner, 19 N.J. Eq. 433, 435 (1868) "Parents while living have a right to control the religious education of their children, and their wishes in this respect must be regarded after their death. . .the court will presume that they wished their children educated in their own faith." **In re** McConnon, 60 Misc. 22, 112 N.Y. Supp. 590 (Surr. Ct. 1908).

6. **In re** Lamb's Estate, 78 Misc. 325, 139 N.Y. Supp. 685 (Surr. Ct. 1912); **cf. Ex parte** Flynn, 87 N.J. Eq. 413, 100 Atl. 861, 863 (Ch. 1917) "It is also settled that person standing **in loco parentis** to an infant have a right of custody as against strangers."

7. People **ex rel.** McGrath v. Gimmler, 60 N.Y.S.2d 622 (1946); Commonwealth **ex rel.** Stack v. Stack, 141 Pa. Super. 147, 15 A.2d 76 (1940).

8. **In re** Santos, 278 App. Div. 373, 105 N.Y.S. 716, 718 (1951) "To this the children have a natural and legal right of which they cannot be deprived by their temporary exposure to the culture of another religion prior to the age of reason." In **In re** Korte, 78 Misc. 276, 139 N.Y. Supp. 144 (1912), it was presumed that the unknown parents were Catholic because the children were left with a Catholic foundling institution. **Cf.** Palm v. Smith, 183 Ore. 617, 195 P.2d 708 (1948), where an erroneous commitment of a Catholic child to a non-Catholic institution was revoked on the ground that the child "is entitled to be raised as a Roman Catholic."

9. **In re** Glavas, 203 Misc. 590, 121 N.Y.S.2d 12 (1953); Commonwealth **ex rel.** Stack v. Stack, 141 Pa. Super. 147, 15 A.2d 76 (1940).

10. Section III (G) **infra,** includes a discussion on conditional awards.

11. D'Alton v. D'Alton, L.R. 4 P.D. 87 (1878); **In re** Agra-Ellis, L.R. 10 Ch. 49 (1878); **In re** Newbery, L.R. 1 Ch. 262 (1866).

12. **In re** Scanlan, L.R. 40 Ch. 200 (1888); Hawksworth v. Hawksworth, L.R. 6 Ch. 539, 542 (1871) After the death of a Catholic father, the mother had brought up the infant for eight and a half years as a Protestant. The court said, "any persons who have the guardianship of a child after the father's death, should have sacred regard to the religion of the father in dealing with the child; and unless under very special circumstances, to see that the child is brought up in the religious faith of the father.

13. Guardianship of Infants Act. 15 & 16 Geo. 45 c. § 1 (1925).

that marriage.[14] An early New York case, *In re Jacquet*,[15] adopted the "parental right" theory by substituting a Catholic guardian for a Protestant in accordance with the natural father's direction, he being Catholic but unfit as custodian. The courts of New York went further in support of this doctrine in *Matter of Santos*,[16] which involved a Catholic mother who, unfit as custodian, had placed her children in a Jewish home, but four years later reappeared to move the children to insure a Catholic training. The trial court found to transfer the children from the Jewish home to a Catholic institution would be an undesirable experince, harmful to the children's welfare. Upon appeal the trial court's decision was reversed, without any reference to the children's best interest and general welfare. Although New York has generally been classified as following the "parental right" theory,[17] some decisions have disregarded the doctrine where harsh results would occur.[18] A 1960 case, *Paolella v. Phillips*,[19] held that a remarried mother having custody of her children, who had become converted to Judaism, would not be directed upon the request of the Catholic father to raise the children as Christian. To determine custody solely upon a child's religious continuity, without considering other factors, as the child's security, happiness, and welfare, will often lead to a repugnant or impractical situation. Therefore the "parental right" theory should be modified where the child's welfare demands it.

B. *The "Hands Off" Theory*—The "hands off" theory treats religion as a matter not within the proper realm of the courts.[20] The constitutional guarantee of religious freedom, plus the possibility that a trial judge's discretion may be influenced by his own religious views, explains the reluctance of courts to inject themselves into this area. An

14. See, e. g., N. D. Cent. Code § 14-09-06 (1961) "The husband and father, as such, has no right superior to those of the wife and mother in regard to the care, custody, education and control of children of the marriage." Donahue v. Donahue, 142 N.J. Eq. 701, 61 A.2d 243 (1948).

15. 40 Misc. 575, 82 N.Y. Supp. 986 (Surr. Ct. 1903).

16. 278 App. Div. 373. 105 N.Y.S.2d 716 (1951), 65 Harv. L. Rev. 694 (1952).

17. See 54 Colum. L. Rev. 376, 378 (1954).

18. **Ex parte** Agnello, 72 N.Y.S.2d 186 (Sup. Ct. 1947).

19. 27 Misc. 2d 763, 209 N.Y.S.2d 165 (1960).

20. Describes v. Wilmer, 69 Ala. 26 (1881); McLaughlin v. McLaughlin, 20 Conn. Supp. 278, 132 A.2d 420 (1957); Matter of Kananack, 272 App. Div. 783, 69 N.Y.S.2d 889, 891 (1947) The court "will not take a child's religious education into its own hands short of circumstances amounting to unfitness of the custodian."

early Wyoming case, *Jones v. Bowman*,[21] held that religious considerations would not be given "the slighest weight in our decision," due to the statutes prohibiting a distinction as to religious beliefs in awarding custody of minor children. This view was reaffirmed in a recent Kansas decision, *Jackson v. Jackson*,[22] which held the trial court had abused its discretion by permitting religion to be a determining factor in its award. These cases have decided the controversy as if the religious factor were completely absent.

There appears to be a distinguishable group of cases within this theory which use qualifying language as to the degree of non-interference. *Denton v. James*,[23] cited in the *Jackson* case, qualified their decision as follows:

> "Aside from" teachings subversive of morality and decency and some others equally obnoxious "the courts have no authority over that part of a child's training which consists in religious discipline, and, in a dispute relating to custody religious views afford no ground for depriving a parent of custody, who is otherwise qualified."

In *People ex rel. Sisson v. Sisson*,[24] the court referred to a child's religious education as an internal affair of the home in which the courts will not venture. "Disputes between parents when it does not involve anything immoral or harmful to the welfare of the child is beyond the reach of the law."

To ignore religious considerations is equally as objectionable as making religion a sole factor in the custody award, because the religious upbringing may greatly affect the child's happiness and welfare. So this minority rule should not be invoked unless the competing religions are so closely alike that it could never affect the child.

C. *The "Best Interest" Rule*—Courts which follow the "best interest" rule will consider the question of religion from the standpoint of what is best for the welfare of the child.[25]

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21. 13 Wyo. 79, 77 Pac. 439 (1904).
22. 181 Kan. 1, 309 P.2d 705, 710 (1957) 'Religious freedom as guaranteed by our Constitution should be faithfully upheld, and the regligious teachings to the children by a parent or parents, regardless of how obnoxious the same might be to the Court, the other parent or the general public should not and must not be considered as basis of making child custody orders."
23. 107 Kan. 729, 193 Pac. 307, 311 (1920).
24. 271 N.Y. 285, 2 N.E.2d 660, 661 (1936).
25. **E. g.,** Commonwealth **ex rel.** Donie v. Ferree, 175 Pa. Super. 586, 106 A.2d 681 (1954); Fannett v. Tomkins, 49 S.W.2d 896 (Tex, Civ. App. 1932) "In determining this supremely important question, the opportunities of the child to wholesome surroundings, morally and socially, opportunity for education, Christian culture and training, associations with and influence of worth-while persons, calculated to impress the character, mind and

The rule originated from the common law doctrine of *parens patriae,* which granted the English sovereign guardianship over all infants.[26] In this country the court represents the state as the ultimate parent of all minors, so possess the power and responsibility of looking after their care and protection.[27] Therefore, a court may in its sound discretion consider the probable future religious training of children where their best interests and general welfare require it.[28] The rule was well stated in *Commonwealth ex rel. Kuntz v. Stackhouse:*[29]

> "The paramount consideration in cases of this nature is at all times the welfare of the child, which includes its physical, intellectual, moral and spiritual well-being, and all other considerations are subordinate."

This viewpoint tends to put more weight on the surrounding social factors then the technical legal rights of parents. It permits the courts to look to all the circumstances of each case when deciding upon the course most likely to secure the welfare of the child. The Massachusetts case of *Purington v. Jamrock,*[30] summarized the "best interest" rule as followed by the great weight of authority.

> "But in such a case as this it is not the right of the parents that are chiefly to be considered. The first and paramount duty is to consult the welfare of the child. The wishes of the parent as to the religious education and surrounding of the child are entitled to weight, if there is nothing to put in the balance against them, ordinarily they will be decisive. If, however, those wishes cannot be carried into effect without sacrificing what the court sees to be for the welfare of the child, they must so far be disregarded. The court will not itself prefer one church to another, but will act without bias for the welfare of the

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morals of the child, should be given controlling consideration." Schreifels v. Schreifels, 47 Wash. 2d 409, 287 P.2d 1001 (1955); State **ex rel.** Strachota v. Franz, 166 Wis. 32, 163 N.W. 191, 192 (1917) "The question of the religion in which the child shall be brought up is always entitled to careful consideration."

26. Helton v. Crawley, 241 Iowa 296, 41 N.W.2d 60 (1950).

27. **In re** Turner, 94 Kan. 115, 145 Pac. 871, 873 (1915) "(T)he state, as **parens patriae,** may exercise over the child parental care and authority in order that he may receive the highest good from the state and achieve the best results for himself. . . ."

28. Parks v. Cook, 180 S.W.2d 64 (Mo. 1944); State **ex rel.** Bize v. Young, 121 Neb. 619, 237 N.W. 677 (1931); Scanlon v. Scanlon, 29 N.J. Super. 317, 102 A.2d 656, 662 (1954) "Nevertheless in awarding the future custody of an infant, the religious training of the child is appropriately an element which, in our opinion, may be considered among all the circumstances of gradational significance in promoting the general welfare of the infant. We decline to decide that it is a subject which in all such cases should by the inhibitions of law be entirely disregarded." People **ex rel.** Woolston v. Woolston, 135 Misc. 320, 239 N.Y. Supp. 185 (1929).

29. 176 Pa. Super. 361, 108 A.2d 73, 74 (1954).

30. 195 Mass. 187, 80 N.E. 802, 805 (1907).

> child under the circumstances of each case. This is the fair concensus of judicial opinion, although a difference of circumstances has caused the use of different expression and reaching of different results in the different cases."

When a court in fixing custody decided that the future welfare of a child would best be served by his being raised in a particular religion, it should make its award accordingly.

III. FACTORS EFFECTING THE CONSIDERATION OF RELIGION

A. *Constitutional Issue*—Under our system of separation of church and state, the interests of the parent often clash with the powers of the state. This is especially true when a court is called upon to award custody of a child between competing applicants of diverse religious faiths. In such a situation *can a court constitutionally consider religion from the standpoint of what is best for the child,* or would this be *per se* a violation of the constitutional guarantee of religious liberty.

The First Amendment to the Constitution of the United States provides that: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." While this provision refers to prohibitions imposed only on Congress, they have been incorporated into the Fourteenth Amendment as prohibitions against the state. Therefore, it has become a basic principle of our judicial system to accord the highest possible respect to rights of parents in directing and controlling the religious training of their children, but this right is not beyond limitation.[31] There is a superior power in the state to promote and provide for the welfare of its children, which should not be nullified because a parent claims his rights, as provided by the First Amendment, have been infringed.[32] True, a court in determining custody may not arbitrarily prefer one religious faith over another, but should act without bias for the welfare of the child under the circum-

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31. Prince v. Massachusetts, 321 U.S. 158 (1944); People **ex rel.** Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952).

32. Prince v. Massachusetts, 321 U.S. 158 (1944), where the court upheld a child-labor law against a member of a religious sect who furnished his child with religious literature to sell; People v. Pierson, 176 N.Y. 201, 68 N.E. 243 (1903), where the court convicted a parent who neglected to call a physican for ill child because he believed in Divine healing; State **ex rel.** Bize v. Young, 121 Neb. 619, 237 N.W 677, 682 (1931) "Every child. . .has from the time it comes into existence, a birthright of citizenship which vests it with rights and privileges entitling it to governmenal protection, and such government is obligated by its duty of protection to consult child's welfare, comfort, and interest in regulating its custody during minority."

stances of each case.

(Further constitutional issues related to the subject of religion and custody will be discussed under the following factual situation in which it arises.)

B. *Statutes*—It is evident by the presence of "religious preference" or "protection" statutes in nearly all jurisdictions[33] that state legislatures recognize that religion must be given some consideration in custody proceedings. While such a statute exists in North Dakota it is limited to cases over which the Juvenile Court has jurisdiction. However, its language may be used here as an example of that found in other states where like statutes apply to custody, adoption and guardianship:

> "In the placement by such court under the provisions of this chapter *due regard* shall be given to the religious faith held by the parent or parents of the child and *so far as is practical* the child shall be placed with a family or institution holding or representing the same religious faith as that held by the parent or parents of said child."[34]

How the North Dakota courts would interpret this statute is open to conjecture. The New York courts, which give great weight to the parental right theory of awarding custody, have strictly enforced their "religious protection" statutes.[35] Such a result is obvious, for these statutes have as a purpose the protection of the parents' desires to propagate their religious convictions.[36] It would also appear that the Massachusetts courts will reach the same result. In the *Petition of Goldman*,[37] a Jewish couple was ordered to give up three year old twins who had been in their possession since the age of two weeks because their natural mother was Catholic. It was held that since there were equally as capable Catholic families seeking to adopt children such as the twins, it would be practicable,

33. For a thorough analysis of statutes in this area see Note, 54 Colum. L. Rev. 376, Statutory App. 396-403 (1954).

34. N. D. Cent. Code § 27-16-22 (1961) (emphasis added). Interesting to note is that this section was amended to read as above in 1961. Prior to this the statute contained a strict requirement that the child "shall be placed with a family or institution holding or representing the same religious faith as that of the parents of said child". Apparently the law makers of North Dakota were made aware of judicial decisions involving analogous statutes; and have attempted to provide the Juvenile Courts of this state with a more workable, if not also to insure the provision's constitutionality.

35. **In re** Santos, 278 App. Div. 373, 105 N.Y.S.2d 716 (1951). In interpreting § 88 (1) (5) of the N.Y. Dom. Rel. Ct. Act the court stated: "The legislative mandate leaves no area for judicial discretion." 105 N.Y.S.2d at 718.

36. **In re** Doyle, 16 Mo. App. 159, 167 (1884) "The enactment is not made with any view to the eternal interests of the child in a future state of existence, but with a view to the rights and feelings of the parents."

37. 331 Mass. 647, 121 N.E.2d 843 (1954), **cert. denied,** 348 U.S. 942 (1955).

within the meaning of the statute,[38] to give custody only to persons of the Catholic faith. Certainly this case shows the fallacy of strictly interpreting such statutes, for it is beyond comprehension how it could be in the best interest of the twins to deprive them of the only parents they had known.

A more liberal view is expressed by the Missouri courts which, in construing a conditional mandatory statute,[39] clearly place the child's temporal welfare first; and give only advisory effect to the statutory requirement.[40] Modifying the Missouri rule slightly is the recent Illinois case of *Cooper v. Henricks*,[41] which held that while "religious preference" statutes should not bar other factors, *due consideration* must be given to religion. The court said:

> "Such a construction pays respect to the desire of the natural parents that their child will be accorded the benefits which they believe are afforded by the particular religion they profess, and at the same time does not allow this potential benefit to jeopardize the welfare of the child or be at the expense of the child's best interest."[42]

Each view would give some degree of weight to these statutes; and to do so may raise a constitutional question. Surprisingly this issue has seldom been adjudicated. In the *Goldman* case[43] the court upheld the Massachusetts statute as constitutional by reasoning: "All religions are treated alike. There is no 'subordination' of any religion." It has been argued that this does not answer the constitutional question, and that these statutes are repugnant to the American idea of complete separation of church and state.[44] These writers rely on the case of *McCollum v. Board of Education*,[45] which interprets the Constitution as preventing the state from giving aid to *any or all* religions. Certainly this argument has merit in these jurisdictions where the statutes are strictly enforced, but where they are interpreted to be only advisory this objection becomes no more than an academic question which need not be considered in reaching a just result. A more vital

38. Mass. Ann. Laws ch. 210, § 5B (1958), provides that "the judge when practicable must give custody only to persons of the same religious faith as that of the child." (Applicable to adoption proceedings).
39. Mo. Rev. Stat. § 475.045 (3) (1959).
40. **In re** Duren, 335 Mo. 1222, 200 S.W. 343 (1947); State **ex rel.** Baker v. Bird, 253 Mo. 569, 162 S.W. 119 (1913).
41. 10 Ill. 2d 269, 140 N.E.2d 293 (1957).
42. **Id.** at 297.
43. **Supra** note 37, 121 N.E.2d at 846.
44. See Pfeffer, **Religion in the Upbringing of Children,** 35 B.U.L. Rev. 334, 374-76 (1955); Comment, Ill. L. Rev. 114, 117-19 (1957).
45. 333 U.S. 203 (1948).

reason exists for not conceding the statutes any more than advisory effect. In any custody proceeding it is the welfare of the child which should be of prime concern. The protection of a child's interest depends on a large amount of discretion on the part of a competently informed trial judge, not on strictly prohibitive legislative acts narrowly delineating his powers. Therefore these statutes must be subjacent to the best interest rule; and in all cases be of no greater effect then an indication that the legislatures recognize that religion is a vital element in determining the overall welfare of a child.

C. *Agreements Between Parties*—Parties frequently attempt to avoid conflict over the religious training of their prospective children by reaching a mutual agreement as to which faith they are to be instructed in. Whatever the motive behind these ante-nuptial agreements, the courts have generally held them to be without legal weight.[46] Only New York has given binding effect to such agreements between parents, or with third parties. In *Ramon v. Ramon,*[47] a lower New York court upheld a antenuptial agreement on the basis that the child's "spiritual and Catholic training . . . [in his] . . . own faith is paramount over any material considerations". Earlier, in upholding a specific performance suit brought in behalf of an infant against the promisor who had agreed to support the child if he could direct its religious education, the New York Court of Appeals said: "Agreements between parties for a particular sort of religious upbringing have been in general held valid in this country."[48] Williston surprisingly makes the same statement.[49]

Similarily, in *Shearer v. Shearer,*[50] the court stated that "the agreement . . . was an inducing cause of this marriage and is an enforceable contract which, in and of itself, should be upheld". However, this is qualified by the next statement:

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46. See McLaughlin v. McLaughlin, 20 Conn. Supp. 278, 132 A.2d 420 (1957); Stanton v. Stanton, 213 Ga. 545, 100 S.E.2d 289 (1957); Dumais v. Dumais, 152 Me. 24, 122 A.2d 322 (1956); Boerger v. Boerger, 26 N.J. Super. 90, 97 A.2d 419 (1953). See also ZOLLMAN, AMERICAN CHURCH LAW 46 (1933), where the author suggests that the American cases may have been influenced by the English rule of unenforceability, since historically the Catholic Church has been looked upon with disfavor by the British.

47. 34 N.Y.S.2d 100, 112 (Dom. Rel. Ct. 1942).

48. Weinberger v. Van Hessen, 260 N.Y. 294, 183 N.E. 429, 431 (1932). For dictum to this same effect see **Ex parte** Kananack, 272 App. Div. 783, 69 N.Y.S.2d 889 (1947); **In re** Lamb's Estate, 139 N.Y. Supp. 685 (Surr. Ct. 1912); **In re** Luck, 7 Ohio N.P. 49 (1900).

49. 6 WILLISTON, CONTRACTS § 1744A n.3 (1938); **but see** Pfeffer, **Religion in the Upbringing of Children,** 35 B.U.L. Rev. 334, 360 (1955), where the author criticizes Williston and the New York Court of Appeals for relying on decisions which do not support their holding.

50. 73 N.Y.S.2d 337, 358 (1947).

"But I am charged with a responsibility even more impelling than the religious rights of the father. The controlling consideration here is the welfare of the children."

Later New York decisions appear to enforce the best interest rule in derogation of antenuptial agreements;[51] but where the child's welfare is not in jeopardy it is presumable that New York courts will continue to enforce such agreements as any other contract.[52]

If usual contract law were to apply there would appear to be no reason why a promise made in consideration of marriage should not be binding; especially if no harm would come to the child.[53] The problem which arises is upon what basis may these contracts be enforced in secular courts. For a breach of such contract it would be undesirable to award money damages, as it is the religious welfare with which the promisee is vitally concerned. Nor will most courts enforce a suit for specific performance since there is no practical way in which this decree could be enforced.[54]

However, the most cogent argument is based on estoppel. Undeniably there are many who believe that a "Catholic has changed his or her status irrevocably"[55] when induced to marry by the willing promise of a non-Catholic; and that for such consideration[56] the promisor should be estopped from changing the religion of the children. This contention has been overridden by the discretionary power of the court in applying the best interest rule,[57] and by public policy.[58] Since a parent cannot bind himself irrevocably to a certain belief, neither should it be held that he can bind his children. To de-

51. Martin v. Martin, 308 N.Y. 136, 123 N.E.2d 812 (1954); Hehman v. Hehman, 13 Misc. 2d 318, 178 N.Y.S.2d 328 (Sup. Ct. 1958).

52. See Martin v. Martin, 308 N.Y. 136, 123 N.E.2d 812, 813 (1954) (dissenting opinion).

53. 2 RESTATEMENT, CONTRACTS § 583 (2) (1932); 1 WILLISTON, CONTRACTS § 110 (1936).

54. See Wood v. Wood, 168 A.2d 102 (Del. Ch. 1961); Note, **Enforceability of Antenuptial Contracts in Mixed Marriages,** 50 Yale L.J. 1286, 1289 (1941).

55. See White, **The Legal Effect of Antenuptial Promise in Mixed Marriage,** 84 Ecclesiastical Review 496 (1932), in ZOLLMAN, AMERICAN CHURCH LAW 47 (1933).

56. **In re** Luck, 7 Ohio N.P. 49, 50 (1900) "There can be no question but that this ante-nuptial agreement was based upon the highest and most solemn import." (dictum).

57. Boerger v. Boerger, 26 N.J. Super. 90, 97 A.2d 419, 425 (1953) "To invoke the principle of estoppel. . .would be to disregard the overriding consideration of what is best for the children and to determine—arbitrarily —their future welfare by an act which they had nothing to do."

58. See Pfeffer, **Religion in the Upbringing of Children,** 35 B.U.L. Rev. 334, 364 (1955).

prive the promisor of his right to change his mind is not within the power of the courts.[59]

Uncertainty exists among judges and legal writers as to what weight, if any, should be accorded these agreements when determining which party is to have custody. This confusion is a result of a number of cases in which custody is awarded in accord with the agreement, but without judicial declaration as to its effect.[60]

These decisions erroneously clothe the antenuptial agreement with apparent validity, for it is the child's temporal welfare which controls. To suggest that an "agreement will only be enforced if the child's temporal welfare is not thereby prejudiced is meaningless."[61] Both parent's religion or belief must be viewed equally, and to do so no consideration should be given to any agreement.[62] The courts must have full discretion to determine what is in the best interest of the child.[63] In *Stanton v. Stanton,*[64] no effect was given to an antenuptial agreement since the parents could not by contract control the discretion of the court. Under this view, the courts in the *Stanton* case found no error in striking the antenuptial contract from the defendant's answer to his wife's action for divorce. Thus, the best reasoning—in the light of this entire study—would be to hold that antenuptial agreements are not only void as to enforcement but should carry no weight in determining custody.

D. *The Child's Preference*—While a child's preference or choice of custodian is a factor in all custody proceedings, it may be unique when religion is involved. A child who has no aversion to either claimant may, because he likes or dislikes a particular religion, determine which party is to prevail.[65] To ascertain the child's religious choice it is entirely proper for a judge to question a child privately;[66] but it is a more difficult matter to assign the proper weight to such predilection when

59. Hackett v. Hackett, 150 N.E.2d 431 (Ohio Ct. App. 1958); Boerger v. Boerger, 26 N.J. Super. 90, 97 A.2d 419 (1953); see Friedman, **The Parental Right to Control the Religious Education of A Child,** 29 Harv. L. Rev. 485, 492 (1916), where the author states: "No mere agreement as to the religious education of children between father and mother before or after marriage is binding and is always open to either parent to change his mind."

60. See, **e. g.,** Shine v. Shine, 189 S.W. 403 (Mo. 1916); Commonwealth **ex rel.** Conrad v. Conrad, 165 Pa. Super 628, 70 A.2d 433 (1950).

61. Pfeffer, **supra** note 58, at 363.

62. See Brewer v. Cary, 148 Mo. App. 193, 127 S.W. 685 (1910).

63. Wood v. Wood, 168 A.2d 102 (Del. Ch. 1961).

64. 213 Ga. 545, 100 S.E.2d 289 (1957).

65. "In choosing the religion of one parent rather than the other the child is frequently either consciously or unconsciously also choosing one parent rather than the other." Matter of Vardinakis, 160 Misc. 13, 289 N.Y. Supp. 355, 361 (Dom. Rel. Ct. 1936).

66. See, **e. g.,** Boerger v. Boerger, 26 N.J. Super. 90, 97 A.2d 419 (1953).

pondering a decision.[67] The law does not set an age over which the child's wishes will be granted,[68] instead such things as the child's maturity and intelligence are given consideration.[69]

There are cases in which children of twelve[70] and thirteen[71] have been allowed to decide which religion they want to follow. However inherent dangers exist in allowing children of such tender years to veto the discretionary power of the court. That which seems the most pleasurable to the child is not necessarily in his best interest. Also, there is a possibility of undue influence being exerted upon a child.[72] Therefore it must be borne in mind that while the child's preference is an important factor to consider it is not controlling and should never be used as an excuse to avoid the main issue.

E. *The Effect of Atheistic Beliefs*—In a court proceeding to determine custody of a child, the mother admits she is an avowed atheist, who rejects belief in a supreme being. The father is an upstanding Christian, who prays for custody so as to insure the child a religious training with a Christian belief in God. In such a case has the mother an equal right to the custody of her child?

Two famous English cases, which are widely quoted, have been decided on this point. In *In re Besent,*[73] a mother was refused custody of her daughter because she embraced atheistical opinions. The court said the refusal of religious instruction to the child and the publication of an obscene book on birth control were sufficient grounds for removing the child from the control of her mother. The other case, *Shelley v. Westbrooke,*[74] deprived the poet Shelley of the custody of his children for being an avowed atheist with conduct considered highly immoral. These cases were decided at a time when any belief differing from the established church was strongly discriminated against. It was largely to escape such religious

67. **Compare** Stafford v. Stafford, 299 Ill. 438, 132 N.E. 452 (1921), where the court said the nine year old child's wish should have no great weight, **with** State **ex rel.** Bize v. Young, 121 Neb. 619, 237 N.W. 677 (1931), where it was stated a nine year old's wish will usually be accorded great weight See Weinman, **The Trial Judge Awards Custody,** 10 Law & Contemp. Prob. 721, 730 (1944), where the author states: "The judge is apt to be guided by this preference in direct proportion to the age of such child."

68. See Commonwealth **ex rel.** Shamenek v. Allen, 179 Pa. Super. 169, 116 A.2d 336, 339 (1955); N.D. Cent. Code §§ 30-10-10, 12 (1961), provide that in guardianship cases a minor if over fourteen years of age may nominate, but that the final discretion remains with the court.

69. See, e. g., Commonwealth **ex rel.** Stevens v. Shannon, 107 Pa. Super. 557, 164 Atl. 352 (1933).

70. Martin v. Martin, 308 N.Y. 136, 123 N.Y.S.2d 812 (1954).

71. Hehman v. Hehman, 13 Misc. 2d 318, 178 N.Y.S.2d 328 (Sup. Ct. 1958).

72. **Cf.** Hawksworth v. Hawksworth, L.R. 6 Ch. 539 (1871).

73. L.R. 11 Ch. 508 (1879).

74. Jac. 266, 37 Eng. Rep. 850 (Ch. 1821).

discrimination that many came to the United States hoping belief differing from the established Church was strongly dis- to worship in their own way, under the constitutional guarantee of religious liberty.

Yet even under these guarantees the common law disabilities of an atheist have only been slowly removed.[75] It is evident that the United States is a religious nation founded upon Christian principles.[76] That these same principles should influence a trial judge is understandable. In many custody proceedings reference is commonly made to the good religious standing or qualifications of the custodian chosen.[77] This existing bias is intensified to complete adhorrence by a large percentage of the population when atheism is interwoven with an un-American belief such as Communism.[78]

However, it would appear safe to say that today no one would, or should be denied custody *solely* because he rejects either Christianity or the generally accepted doctrine of natural religion.[79] In a recent case, *Toracaso v. Watkins,*[80] the United States Supreme Court struck down a part of the Maryland Constitution which provided: "No religious test ought ever to be required as a qualification for any office . . . other then a declaration of belief in the existence of God." In their opinion the court said:

> "We repeat and reaffirm that neither a State nor the Federal Government can constitutionary force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws nor impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[81]

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75. See 49 Harv. L. Rev. 831 (1936).
76. Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).
77. Guess v. Glenn, 294 S.W.2d 940 (Ky. 1956) (good christian people); Dansker v. Dansker, 279 S.W.2d 205 (Mo. 1955) (Benefit of a religious atmosphere); Fannett v. Tompkins, 49 S.W.2d 896 (Tex. Civ. App. 1932) (Opportunity to Christian culture and training).
78. Eaton v. Eaton, N.J. Ct. of Chancery, January 27, 1936, N. Y. Times, January 30, 1936 p. 1; Commented on: 49 Harv. L. Rev. 831 (1936); 36 Colum. L. Rev. 678 (1936) The plaintiff admitted to refecting belief in a supreme being, to a belief that organized religion is useless, and to attending lectures and reading books about what the court termed "Communism, Atheism, and I.W.W.-ism." Held, "The plaintiff has no right against the will of the father, to teach her 'un-American' beliefs to her children,"; **aff'd** on other grounds, 122 N.J. Eq. 142, 191 Atl. 839 (1937).
79. See **In re** Doyle, 16 Mo. App. 159, 166 (1884) "A father in Missouri forfeits no rights to the custody or control of his child for being, or becoming, an atheist, nor are rights in this respect increased before the law by his believing rightly. The law does not profess to know what is a right belief." (dictum).
80. 376 U.S. 488 (1961).
81. 29 U.S.L. Week 4865, 4867 (June 19, 1961).

Our Constitution must, if there is to be true religious liberty, protect the unbeliever as well as the believer.[82] There is no evidence that an athiest is any less qualified a citizen, or that he possesses a subversive standard of secular morality.

But these arguments, and this must be emphasized, do not preclude the courts from considering a person's beliefs or disbeliefs in deciding the future of a child.[83] The courts do have a superior interest in the protection of a child's temporal welfare, so if these convictions in any way effect this welfare, it would not be beyond the discretionary power of the court to award custody to the Christian party.

F. *Unconventional Beliefs as a Factor*—It is vital to the understanding of the judicial power to distinguish between a conviction or belief *per se* and the acts and duties inherent to such beliefs, which because of social manifestations may be forbidden by law or subject to regulation.[84] Minority or fanatical sects are frequently associated with such unorthodox practices which are extremely unpopular to the members of conventional religions.[85] These practices, it has been plausibly argued, tend to create outcasts of the children thereby causing psychological harm and affording grounds on which the parent may be deprived of custody. It is clear that the constitution does not require a sacrifice of a child's well-being to protect an individual's religious liberty. If the practices of these unconventional sects actually effect the child temporally, such as depriving him of medical care,[86] secular educa-

82. **Cf.** West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) "If there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matter of opinion or force citizens to confess by word or act their faith therein."

83. **In re** Korte, 78 Misc. 276, 139 N.Y. Supp. 444, 446 (1912) "No one is more keenly cognizant than I of the liberal policy of our Constitution and our laws toward religious liberty and freedom to worship as one choses, but it would be a manifest wrong to permit these children to be brought up in a condition of pagan unbelief and atheism, . . . keeping in mind the welfare of the children is the paramount consideration which guides the court." In **Ex parte** Agnello, 72 N.Y.S.2d 186 (1947), the court refused to transfer custody of 13 year old twins from Catholic aunt to their atheist father.

84. Shapiro v. Dorin, 199 Misc. 643, 99 N.Y.S.2d 830, 835 (1950) "The constitutional guaranty of religious liberty embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation of society."

85. Gluckstern v. Gluckstern, 17 Misc. 2d 83, 158 N.Y.S.2d 504 (1956) (Christian Scientist—healing by faith rather than by medicine); **In re** Sisson, 152 Misc. 806, 274 N.Y. Supp. 857 (Child. Ct. 1934) (Megiddo Sect.—dress and behavior very different from that ordinarily followed by American children); Salvaggio v. Barnett, 248 S.W.2d 244 (Tex. Civ. App. 1952) (Jehovah's Witness—belief that Bible requires one not to salute the American Flag, to celebrate and exchange gifts at Christmas, and to kill others in defense of the United States).

86. See Gluckstern v. Gluckstern, 4 N.Y.2d 521, 158 N.Y.S.2d 504 (1956); People **ex rel.** Trafford v. Trafford, 12 N.Y. Supp. 43 (Sup. Ct. 1890).

tion,[87] or parental supervision;[88] the courts may intervene in the behalf of the child. In a recent custody proceeding, *Battaglia v. Battaglia*,[89] which deprived a mother of the custody of her child, the courts stated: "Petitioner, of course, enjoys her constitutional right to freedom of religion and may practice the religion of her choice without interference. She has not, however, the right to impose upon an innocent child the hazards to it flowing from her own religious convictions." Where, in the discretion of the court, these practices do not go so far as to affect the child's psychological, social or economic welfare the majority of courts hold that these unpopular religions must be given equal protection under the Constitution.[90]

G. *Conditional Awards*—Where the child's temporal welfare would not be advanced by fixing custody in a person of the same faith as the child or his parents, the courts have often conditioned the award by requiring the child to be raised in the faith of his training, or by allowing another to control his religious education. While it is granted that in some cases this may be best for the child, these decisions are not normally condoned by social or legal authorities. Whenever possible the custodian should be given full power to control all aspects of the child's training. "There is great risk of discontinuity of emotional and intellectual development" when custody is split between two parties.[91] A child needs to feel that he belongs to someone in a family relationship. This security cannot be achieved if the child is to be shuttled between two parents or parties of opposing religious beliefs.[92] A difference of religion may cause a basic conflict in the mind of the child, and between it and the custodian.[93] To require a conscientious devotee of one religious sect to raise a child in a hostile religion will not only tend to separate the child and

87. Application of Auster, 198 Misc. 1055, 100 N.Y.S.2d 60 (1950), **aff'd**, 102 N.Y.S.2d 418 (1951).

88. **In re** Watson, 95 N.Y.S.2d (Child. Ct. 1950); Commonwealth **ex rel.** Derr v. Derr. 148 Pa. Super 511, 25 A.2d 769 (1942).

89. 9 Misc. 2d 1067, 172 N.Y.S.2d 361, 362 (1958).

90. Johnson v. Borders, 155 Ark. 218, 244 S.W. 30 (1922); Cory v. Cory, 70 Cal. App. 2d 563, 161 P.2d 385 (1945); Reynold v. Rayborn, 116 S.W.2d 836 (Tex. Civ. App. 1938); Stone v. Stone, 16 Wash. 2d 315, 133 P.2d 526 (1943). **But see** Salvaggio v. Barnett, 248 S.W.2d 244 (Tex. Civ. App. 1952) "It is in no way contended that appellan't religious teaching to his child would be immoral or illegal, but merely that they would be unpopular."

91. See CAVAN, THE AMERICAN FAMILY 518 (1956).

92. **Cf.** Molto v. Molto, 242 Minn. 112, 64 N.W.2d 154 (1954).

93. Boerger v. Boerger, 26 N.J. Super. 90, 97 A.2d 419 (1953).

custodian,[94] but is also a decree almost impossible to enforce.[95]

IV. CONCLUSION

Throughout this discussion the "best interest" rule has been used with the understanding that religion is a component element thereof; but this is by no means a unanimous consensus of opinion. A court may base its decision on this rule, but preclude religion as irrelevant, or constitutionally untouchable. However, the majority of jurisdictions recognize religion as a vital element in the determination of the child's overall temporal welfare.

Since religion has never been an issue in a custody proceeding in North Dakota it is recommended that this theory be followed. But it is equally important to remember that religion should never be the sole factor. When all other component elements of the child's temporal welfare have been considered, and both sides are determined to be of nearly the same weight; religion may then rightfully tip the scales in favor of one party or against the other.

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94. "Such a condition tends to estrange the child from the guardian, and as years advance to raise a barrier between them, particularly in the inner life, and it is calculated slowly to impair the beneficial influence which the guardian ought to exercise in the child's best interest." **In re** Nevin, L.R. (1891) 2 Ch. 299, 305.
95. See Wood v. Wood, 168 A.2d 102 (Del. Ch. 1961).

"Do not think that I am come to destroy the law or the prophets. I am not come to destroy, but to fulfill."
JESUS CHRIST—Matthew 5:17